

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**  
(E-Filed: May 2, 2007)

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ELIZA COLLIER DURHAM, a minor, by her )  
mother and natural guardian, )  
MARTHA DURHAM, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
SECRETARY OF THE DEPARTMENT OF )  
HEALTH AND HUMAN SERVICES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

No. 99-648V  
**UNPUBLISHED**  
Dismissal for Failure to  
Prosecute

Clifford Shoemaker, Vienna, VA, for petitioner.

Nathaniel John McGovern, Torts Branch, Civil Division, United States Department of Justice, Washington DC, for respondent.

**ORDER DISMISSING PETITION FOR FAILURE TO PROSECUTE**<sup>1</sup>

On August 5, 1999, Eliza Collier Durham filed a claim for compensation pursuant to the National Vaccine Injury Compensation Program<sup>2</sup> (the Act or the Program) on

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<sup>1</sup> Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless an issued decision contains trade secrets or commercial or financial information that is privileged or confidential, or the decision contains medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. When a special master files a decision or substantive order with the Clerk of the Court, each party has 14 days within which to identify and move for the redaction of privileged or confidential information before the document's public disclosure.

<sup>2</sup> The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 to -34 (2000 & Supp. II 2003) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

behalf of her minor child, Martha Durham. By notice of reassignment dated February 8, 2006, the Chief Special Master reassigned Ms. Durham's petition to the undersigned for consideration.

On March 29, 2006, the undersigned issued an Order (Order), directing petitioner's counsel to "consult with his client and file a status report, indicating how petitioner intends to proceed, by no later than Tuesday, May 30, 2006." Order at 1. On May 28, 2006, petitioner's counsel filed a status report (SR) and requested a one-month extension of time, until July 6, 2006, to contact petitioner. The undersigned granted the requested enlargement of time.

On July 6, 2006, petitioner's counsel filed a Motion for Enlargement of Time (P's Mot.) requesting another thirty days, and stated that counsel "has been unable to contact Petitioner." P's Mot. at 1. Petitioner's counsel represented that someone from his office "had left messages for Petitioner on May 28th, June 7th, June 15th, June 20th, June 29th, and July 5<sup>th</sup>," and that on June 29, 2007, petitioner had returned those calls leaving a message that "she had been out of town for the past couple of weeks." Id. By July 10, 2006 Order, the undersigned granted petitioner's counsel an enlargement of time until August 7, 2006, to inform the court how his client wished to proceed.

On August 7, 2006, petitioner's counsel filed a status report with the court reporting that his client did wish to proceed with her claim. In addition, petitioner requested sixty days to file the vaccinee's medical records.<sup>3</sup> By August 28, 2007 Order, the undersigned granted petitioner's request for an enlargement of time to file the vaccinee's medical records and directed petitioner to file the medical records "on or before Tuesday, October 10, 2006." Order at 1.

On October 10, 2006, petitioner filed a Motion for Enlargement of Time (P's 2d Mot.). Therein, petitioner's counsel stated the following:

The Petitioner stated that she would obtain the records of Eliza. Counsel left messages and emailed Petitioner on August 31, 2006, September 5, 2006, September 7, 2006, September 19, 2006, September 27, 2006 and October 4,

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<sup>3</sup> By July 31, 2001 Order, petitioner's counsel requested authorization for the issuance of numerous subpoenas to obtain records concerning the care and treatment of individual petitioners. By August 14, 2001 Order, Special Master Abell authorized petitioner's counsel to issue the requested subpoenas. On December 14, 2006, petitioner's counsel filed a Motion for Reissuance of Subpoenas for records from St. Francis hospital. By December 20, 1996 Order (Sub. Order), the undersigned granted petitioner's counsel's request for leave to issue a subpoena for the purpose of obtaining "all medical records pertaining to the birth and delivery of Eliza Durham (daughter of Martha Durham)." Sub. Order at 1.

2006. Also, Counsel has left a message for Petitioner on October 10, 2006. In addition, Counsel sent to Petitioner a letter stating that we needed the records ASAP on September 13, 2006. As of the date of the filing of this Motion we have not heard from the Petitioner.

P's 2d Mot. at 1. The undersigned granted petitioner's counsel's request for additional time.

On November 9, 2006, petitioner filed another Motion for Enlargement of Time (P's 3d Mot.). Petitioner's counsel asked for an additional thirty days to file petitioner's medical records and made the following representations:

The Petitioner stated that she would obtain the records of Eliza. Counsel has left messages and e-mailed Petitioner regarding the status of her obtaining these records November 7, 2006 and November 8, 2006. In addition, Counsel has left a message for Petitioner on October 18th and October 24th. In addition, Counsel sent to Petitioner a letter stating that we needed the records ASAP on September 13, 2006. Petitioner has resent the letter, just in case it never made it to the Petitioner. As of the date of the filing of this Motion, we have not heard from the Petitioner.

P's 3d Mot. at 1. Although respondent did not object to this request for additional time, he did ask that a status conference be scheduled to address "the slow progress of the case." Id.

\_\_\_\_ On January 31, 2007, and March 2, 2007, petitioner's counsel filed two more motions for enlargement of time to file medical records. On March 9, 2007, having failed to receive any response from petitioner, the court issued a Show Cause Order (SC Order) directing petitioner's counsel to show cause why this petition should not be dismissed for failure to prosecute on or before April 23, 2007. See SC Order at 1. The Order stated that petitioner's counsel's response should "include proof of communication with petitioner." Id. (stating "[p]etitioner's failure to communicate with counsel and failure to file the outstanding medical records, on or before Monday, April 23, 2007, shall result in the dismissal of this action for failure to prosecute.") (emphasis deleted).

To date, no proof of communication between counsel and petitioner has been filed. Nor have any of the vaccinee's medical records been filed. Accordingly, consistent with the March 9, 2007 Order of the court, this petition is **DISMISSED** for failure to prosecute. The Clerk of the Court shall **ENTER JUDGMENT** accordingly.<sup>4</sup>

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<sup>4</sup> Pursuant to Vaccine Rule 11(a), entry of judgment is expedited by the parties' joint filing of notice renouncing the right to seek review.

**IT IS SO ORDERED.**

s/Patricia E. Campbell-Smith  
Patricia E. Campbell-Smith  
Special Master